

U.S. Department of Labor

Office of Administrative Law Judges
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Case No. 2001-STA-00050

In The Matter of

MARK NILSEN
Complainant

v.

PALCO AIR CARGO, INC.
Respondent

David A. Strock, Esq.
Portland, Maine
For the Complainant

Lawrence C. Winger, Esq.
Portland, Maine
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. 31105 (1984) (hereafter “the Act”), and the applicable regulations at 29 C.F.R. Part 1978. Mark Nilsen (“complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) of the United States Department of Labor on July 8, 2000 contending that he had been terminated by his employer, Palco Air Cargo (“respondent”), in retaliation for complaining to OSHA about allegedly

unsafe working conditions at respondent's garage in Saco, Maine (CX 32).¹ A formal hearing was held in Portland, Maine on October 23 and 24, 2001.

As a preliminary matter, it should be pointed out that there is a serious problem in regard to determining the precise chronology of events which are important to this case, as there is a great deal of inexplicably inconsistent evidence. In at least two cases, corrected copies of memoranda are dated a day or two earlier than the uncorrected memoranda (*compare* CX 8 with CX 9; CX 15A with CX 16).² In regard to CX 15A and 16, one is dated June 19 and the other June 20. They are substantively identical and each states that certain events happened on the date the memorandum was written. Then there is a third memorandum, dated June 22 (CX 22), which states that these same events happened "yesterday" (June 21). Another memorandum apparently pre-dates by more than a week the date of the event which precipitated the memorandum (*compare* CX 7 with TR 418, 507-08; RX 26, at 2). Another memorandum has two different dates on it (CX 21, TR 557).³ Then Claimant's Exhibits 8 and 9 state that on that day (either June 6 or June 8) complainant told Mark Bernstein, respondent's President and owner, that he had an unusual sensitivity to fumes, and Bernstein testified that at that same meeting he told complainant he would price a ventilation system for the garage (TR 424-26; *cf.* CX 8 and 9). Bernstein added that the bid for a ventilation system from Airtemp (RX 38) was obtained following this conversation (TR 425-26). But that bid from Airtemp was dated June 1, either five or seven days prior to the date Bernstein indicated he had the conversation with complainant.

I can find no satisfactory explanation for these conflicts, particularly those memoranda with conflicting dates; nor can I resolve them. But what is really important in regard to chronology is whether these documents were written before or after June 16, 2000, or whether the events discussed in the documents occurred before or after this date; and there does not appear to be much inconsistency in that regard. Accordingly, while it may be impossible based on this record to determine with certainty when some events central to this case occurred, such certainty probably is unnecessary.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent Palco Air Cargo is a trucking company which picks up and hauls freight. Its

¹Citations to the record of this proceeding will be abbreviated as follows: CX – Complainant's Exhibit; RX –Respondent's Exhibit; TR – Hearing Transcript.

²"Usual" on the fourth line of the first paragraph in CX 9 was corrected to read "unusual" in CX 8; in CX 15A, a space was inserted before the word "Delays".

³CX 18, which Bernstein testified was dated two days earlier than CX 21, is not in evidence.

headquarters and principal place of business is in Saco, Maine, but it also has facilities in Portsmouth and Manchester, New Hampshire. Respondent had moved its headquarters from Scarborough, Maine to Saco in March, 2000 (TR 412-13). It has about 65 employees and owns 40-45 trucks. *See* TR 604-05. Mark Bernstein (hereinafter “Bernstein”) is the sole owner and President of Palco (TR 410). Mr. Bernstein’s son Josh (“Josh”), who currently is Vice-President of Palco, was the operations manager and complainant’s direct supervisor at all times relevant to this case (TR 331-32).

The complainant, Mark Nilsen, is a 45 year old high school graduate who has about 65-70 college credits but no degree (TR 268). He has been married to his wife, Heidi, for 21 years, and they have a five year old son (TR 303). Prior to working for respondent, complainant had been a truck driver for 15 years (TR 302). In 1996, he suffered a back injury which prevented him from continuing as a truck driver at that time (TR 25). For the purpose of vocational rehabilitation, he attended numerous safety-related training courses, as well as courses on how to be a supervisor (TR 24-25; CX 58).

Complainant started working for respondent in September, 1999 through a temporary employment agency (TR 138). He testified that from the start he worked full-time (*id.*); but Bernstein, Steve Bennett (respondent’s general manager and Josh’s supervisor) and Michelle Shaw (respondent’s comptroller) all testified that complainant worked part-time for the first 90 days with Palco, at which time he became a Palco employee and began full-time work (TR 335, 410-12, 503). He was hired to work in operations and in dispatching, but because he had problems with the computer system and seemed to know about safety he was asked to work on safety issues instead (TR 21-22, 335, 411). In effect, he became respondent’s safety coordinator. In this job, he worked with Department of Transportation files, maintained drivers’ drug and alcohol test records, scheduled all driver training and did some of the training himself, and played a large role in the hiring of new drivers (but did not decide who to hire) (TR 22-23, 26; CX 1).

In mid-April, 2000, shortly after respondent moved its headquarters to Saco, complainant was made maintenance supervisor in addition to his other duties (TR 414-15). Bernstein determined that the safety position no longer took up a full week’s work, and told complainant that he had to take the maintenance supervisor duties or he would be cut back to only 25 hours a week (TR 337, 415; CX 6). Bernstein testified that complainant took on the added duties reluctantly even though it included a promotion into management (TR 27, 415-16, 337). Complainant’s duties as maintenance supervisor included making sure the company’s vehicles were properly maintained and the garage was safe, ordering parts and supervising the company’s mechanics (TR 27-28; CX 2). Although at the time he became maintenance supervisor the Saco facility had not been completed, and he had been working in a trailer, he was told that he would be moved into an office adjacent to the garage when that office was constructed (TR 142, 416; *see also* RX 1). According to Bernstein, the facility was completed in the middle of May, 2000 (TR 416-17), at which time complainant moved into the new office. The only entrance into that office was through the garage.

Complainant complained about potential exposure to fumes in this office even before he moved into it (TR 143; CX 12), and within a week or two of moving in he was complaining about excessive exhaust fumes in his office (TR 565-66). In addition, he complained that his office did not have a window looking out into the garage (TR 145) and that it did not have a separate door providing a direct entrance into the administrative offices (TR 145-46). Complainant alleged that OSHA regulations required his office to have a second door (TR 432). In a short time a window was put in, but Bernstein refused to put in another door to complainant's office (*id.*). In regard to the exhaust fumes, complainant testified that he complained to Josh, Bennett and Bernstein about the lack of ventilation in the garage (TR 36). He further testified that he contacted a company called Airtemp to obtain a bid on an exhaust system for the garage (TR 151, 199).

Complainant continued to complain about fumes in his office, prompting Bernstein to write a memorandum to him on June 6 or June 8 (CX 8, 9). In this memorandum, Bernstein complained that complainant had not previously informed him that he had an unusual sensitivity to fumes, and reiterated that he was willing to make reasonable changes to improve the environment in complainant's office but he would not make drastic changes because of the sensitivity of one person. He went on to state that "[i]f you feel that is not good enough then you should resign from your position" Complainant did not resign.

The seminal event in this case – complainant's initial complaint to the Occupational Safety and Health Administration ("OSHA") – occurred on June 16, 2000. The parties radically disagree about the events which led up to complainant's phoning OSHA that morning. According to Bernstein, the first thing that morning he wrote a memo to complainant (CX 13) which essentially was a follow-up to Bernstein's June 6 or June 8 memorandum, and personally delivered this memorandum to complainant (TR 519-20). The memorandum informed complainant that Palco was getting bids on an air filtration system, but the bid they had received was out of line.⁴ It further stated that, "[i]f you feel your problems with fumes are making it so that you are unable to work then please leave when that occurs. This will not be held against you." (*Id.*) Bernstein testified that complainant objected to language in the memorandum regarding his alleged "sensitivities" to fumes. He denied having told Bernstein that he had unusual sensitivity to certain fumes (TR 519-20). This really surprised Bernstein, who then left complainant's office and got Bennett and Josh to come back with him to continue the discussion (TR 521-22). When they returned to complainant's office, complainant challenged Bernstein's statement that something was being done to improve any problem there may be with fumes, at which point Bernstein showed him the estimate he had received for an air filtration system for the garage (RX 38). Complainant then said that there is still the problem of not having a second door to his office, which

⁴As the evidence shows, on June 1, 2000, respondent received a proposal for a diesel exhaust system at a cost of \$16,495.00 (RX 38); a second proposal from the same company, dated June 19, 2000, cut the cost to \$5,895.00 (RX 41).

he claimed violated OSHA regulations (TR 522). Bernstein stated he then told complainant “let’s call OSHA and get them in here now to – so we can resolve this issue on the door and the diesel fumes.” (TR 522) He then left complainant’s office. According to Bennett, Josh left soon after Bernstein, although Bennett remained while complainant talked to OSHA. After the phone call, Bennett left complainant’s office (TR 350).

According to the complainant, June 16 was when the so-called “Brakleen” incident occurred.⁵ Palmer was in the garage cleaning out some brake drums using a cleaner called Brakleen. Apparently he used too much of it, because the odor permeated not only the garage and complainant’s office, but seeped into the operations area as well. Complainant states that he then went to get Bennett and Josh, so they could see his complaints about fumes were not fictitious. They opened the garage doors to air it out, and complainant went outside for 10 or 15 minutes until the odor subsided. TR 39-40. Complainant states he documented this incident with a note (CX 11) because “after I was in receipt of numerous deficiencies, I wanted to account for all my time” (TR 42). Complainant stated that shortly after he returned to his office, Bernstein, Bennett and Josh came in to meet with him, at which time Bernstein told him they were not going to put another door in his office, and if he does not like it he can quit (TR 55). Bernstein then suggested that he take the next week off, without pay, so that another employee can use his office and see if there actually was a problem with fumes in complainant’s office (TR 56). Complainant refused, suggesting instead that he will call OSHA and have them come in and measure the exhaust fumes in the air. Bernstein said, “[f]ine, go ahead and call OSHA.” (TR 57; CX 12)⁶ Complainant next stated that with Bernstein, Bennett and Josh all there, he called OSHA and spoke to two people there who told him to put his concerns in writing and send it to them (TR 57). Then Bernstein left his office, followed by Josh who told him “you don’t know what you just did.” (*Id.*) Bennett stayed in his office while complainant typed up a letter to a Mr. Coffin of OSHA (CX 12), and remained there until complainant faxed it off (TR 58).

Complainant stated that sometime later that day, after the OSHA telephone call, Bernstein came into his office and threw the memorandum dated June 16, 2000 mentioned above onto his desk (TR 62-63). He did not discuss this memorandum with Bernstein on June 16 (TR 65). Moreover, on June 16 Bernstein did not show him a proposal by Airtemp to install a ventilation system in the garage (TR 199).

Although the two versions of the occurrences on June 16, 2000 are very different, the differences are not significant in regard to the disposition of this case. For the parties agree that

⁵Bennett believes the Brakleen incident occurred prior to June 16 (TR 366).

⁶Although complainant testified that “they” (referring to Bernstein, Bennett and Josh) said it was fine to call OSHA, Bernstein and Bennett both said it was Bernstein who said this, and Josh said Bernstein and complainant were the only ones who spoke at the meeting. *See* TR 351-52, 394, 522.

complainant made a complaint to OSHA on that day, and there is no disagreement that complainant was told by Bernstein or, at the least, by Bennett or Josh in Bernstein's presence and without contradiction by Bernstein, to go ahead and call OSHA.

In his letter to Coffin at OSHA (CX 12), complainant first lamented that his office was in the garage, stating that he had been promised an office in the operations area.⁷ He complained that the office had only one door and lacked ventilation. He blamed the lack of ventilation on the absence of an air return in the office, which he said was "due to screwed [*sic*] up."⁸ He further alleged that he was being overly exposed to "... welding, chemicals sprayed, diesel exhaust ... on a daily basis" because of these shortcomings. He then discussed the Brakleen incident, stating it happened that morning, and the subsequent meeting with Bernstein, Bennett and Josh. The letter goes on to state that he said he was going to call OSHA, and "[t]hey said go ahead."⁹ He closed by listing other alleged deficiencies at Palco:

They refuse to label any doors in this building for safety (we don't have any bathrooms labeled Men, Women, NOTHING. There is no emergency shower for the mechanics. We don't have chemicals stored in flammable [*sic*] cabinets, in fact they are stored in my office. The required workplace posters are not displayed, the board is not screwed to the wall. The garage has only one light switch in a garage 60-120'. The fire exits in the warehouse are blocked, and they lock the fire exit so night people can't escape.[¹⁰] I urge you do a wall to wall for the safety of all the employees.

Due to complainant's complaint, an OSHA Compliance Officer, John Newton, conducted an unannounced inspection of respondent's Saco facility on June 21, 2000 (TR 167-68). Newton

⁷Complainant's office was not *in* the garage; it was *adjacent to* the garage. See RX 1.

⁸Rather than being a mistake, as complainant alleges, putting an air return in complainant's office would draw fumes from the garage into the office. See RX 22.

⁹It is interesting to note that in his July 6 and July 8, 2000 letters to William Pearson of OSHA, complainant stated that "[a]s I was dialing they stated that 'I had better not call'" (CX 28); and in his July 7, 2000 complaint to the Maine Human Rights Commission he came up with a third version of this exchange, stating under oath that "[w]hen I told them that I was going to contact OSHA, they told me to go ahead and then warned me not to make the call." (CX 29-3)

¹⁰There is no reason to discuss each of these allegations. But it would be unfair to respondent to leave people reading this decision with the impression that complainant's egregious allegations that the fire exits were blocked and are locked at night so people cannot escape were true. In fact, OSHA found that these allegations were *not* true. See CX 40, at 1.

stated he had taken complainant's complaint on a Friday which he believed was June 18 (TR 168).¹¹ When he showed up, he asked to speak to the person in charge, and he was directed to Bernstein. He explained to Bernstein the purpose of his visit and gave him a copy of a sheet he had prepared (RX 37) listing eight items which formed the substance of the complaint (TR 168-69, 189-90). He also noted that Bernstein was calm and did not appear surprised to see him (TR 169). He then met separately with complainant, who gave Newton a list of about 50 safety and health concerns (*see* CX 20).¹² Then Newton and Bernstein walked around the facility, which took about an hour and a half (TR 171). They then had a closing conference in which Newton gave Bernstein a summary of his preliminary findings (TR 171). Sometime during the time he was at Palco Newton told Bernstein that it was an impressive new facility (TR 194). Newton also walked around part of the facility on his own, but he does not remember if that was before or after the closing conference. It was while he was walking around without Bernstein that he noticed a trailer being unloaded which did not have chocks on the wheels (TR 182). Since Bernstein was not with Newton when he saw the unchocked trailer, if Newton discovered it after the closing conference Bernstein would not have known about it until Newton sent him photographs of the truck without the wheel chocks. Newton believes he sent Bernstein the photographs before OSHA issued its *Citation and Notice of Penalty*, which was on July 18, 2000, but he is not sure (TR 183-84).

Newton stated that complainant's two main concerns were fumes in his office and having a second door to his office (TR 184). He testified that he did not find an overexposure to welding fumes, diesel exhaust or chemical sprays either in complainant's office or in the garage (TR 178). In fact, he stated that respondent's work practices would not produce excessive welding fumes, diesel exhaust or chemical exposure, and air sampling was not necessary (TR 178). Newton went on to state that although it might have been a good idea for complainant's office to have a second door, it was not a requirement (TR 185-86).

That the wheels of one tractor-trailer were not chocked while the trailer was being unloaded was the single violation termed "serious" and the only violation which resulted in a civil money penalty in the citation issued to Palco by OSHA as a result of the June 16 inspection (CX 40-7). The penalty was \$700. Ironically, trucks with unchocked wheels was not one of the things included in complainant's June 16, 2000 complaint to OSHA. In addition to the one "serious" violation, eight violations were found which were not considered serious and for which no civil money penalty was assessed: an OSHA poster was not displayed; doors were not marked properly; a written workplace hazard assessment had not been performed; in the garage, a grinder was not securely mounted to the wall; oxygen and acetylene cylinders were not stored separately; a truck body cleaner and the used

¹¹I take judicial notice that June 16, 2000 was a Friday, and June 18, 2000 was a Sunday.

¹²Newton testified that he did not make use of this list during his inspection. He relied on the written complaint filed by complainant. *See* TR 197.

oil barrel were not properly labeled; the employer did not have a material safety data sheet for an alkaline cleaner used by employees; and employees were not adequately trained regarding the health hazards of chemicals in the work area (CX 40, at 8-12).

Complainant had other problems with the respondent which began soon after he became maintenance supervisor. Respondent did not have its maintenance records computerized, and it was complainant's job to do so. He selected J.J. Kellor software for the maintenance records, and started inputting the data (TR 159). However, inputting the data turned out to be a much more time-consuming task than he envisioned, and he was making little progress (TR 159-60). Bernstein was unhappy with the situation – particularly since complainant had picked the software himself – and at a staff meeting on May 26, 2000 he proposed two solutions (*see, e.g.*, RX 26; TR 507). First, complainant was instructed to devote himself from 1:00 p.m. to 3:00 p.m. every day entirely to data entry; no one was to bother him during that period (*id.*). Second, Michelle Shaw, respondent's comptroller, was asked to help complainant to input the truck data into the system (TR 480-81). So she started coming to work at six in the morning to work on inputting this data (RX 26, at 2; TR 484). At the next staff meeting, on June 9, complainant still had not caught up with inputting the data. Complainant told Bernstein that the fact that it was taking so long to input the data was not his fault (TR 203). Shaw was asked to keep pitching in to help complainant get this job done (RX 26, at 4). Two days after the meeting, Shaw complained to Bernstein about continuing to help complainant. She told Bernstein that if she had to keep doing his work, she would quit (TR 485). The inputting of the data had not been completed when complainant was terminated (TR 203, 512-13).¹³

Complainant also ran afoul of Bernstein when, sometime in May, he attended a meeting after Bernstein specifically told him he could not go because he was behind in inputting the data into the computer system (*e.g.*, TR 417-18, 507-08).¹⁴ Despite this instruction, which Bennett knew about, complainant kept pestering Bennett for permission to go to a meeting until Bennett finally told him to go (TR 325-27). However, Bennett did not clear it with Bernstein, and when Bernstein found out that complainant went to the meeting he was incensed at both complainant and Bennett (TR 419, 324).

¹³Complainant's testimony that he believed Bernstein was happy with the progress he was making inputting the data (TR 164) is unfathomable, and shows that complainant either has a tremendous capacity for self-delusion or has no regard for the truth. In either case, this testimony negatively impacts on complainant's credibility.

¹⁴The record is unclear whether this occurred in mid or late May, 2000. The record contains a memorandum dated May 18, 2000 from Bernstein to complainant which states that on May 11, 2000 complainant was warned not to attend outside meetings, and "the next time you ignore any directive from me ... you will be terminated immediately." (CX 7) But Shaw's minutes of a May 26, 2000 staff meeting indicate that complainant was first instructed not to attend outside meetings on May 26 (RX 26).

Complainant contends that, since he obtained Bennett's permission to go to the meeting he did nothing wrong. But he knew that Bernstein had prohibited him from attending the meeting, and he went behind Bernstein's back to get permission to go to it.

Complainant next ran afoul of Bernstein on June 12, when two related matters came to Bernstein's attention. First, Bernstein found out that complainant quoted the wrong hourly wage to a new driver, Paul Dubois, who then complained when he received a smaller paycheck than he expected (TR 517). Then complainant mentioned to one of respondent's drivers who worked out of Maine that respondent's drivers based in New Hampshire are paid more than the Maine drivers (*id.*). Bernstein felt it was bad for the Maine drivers' morale to find out they made less money than their counterparts in New Hampshire. On June 12 Bernstein wrote complainant a memorandum reprimanding him for these actions (CX 10). Complainant denied ever receiving this memorandum (TR 203). Further, although he admitted telling Dubois he would be paid \$12 an hour – \$1.50 an hour more than respondent's usual starting wage for drivers in Maine – he stated that he only told Dubois he would be paid that wage after it was approved by Josh (TR 204-05). But Bernstein testified that after complainant told him Josh authorized Dubois's \$12 an hour starting wage, he asked Josh if he had done so; and Josh stated that he and complainant had never discussed the matter (TR 575-77). Further, Bernstein stated that complainant initialed Dubois's starting wage on the applicable company record (TR 577). In regard to telling a Maine driver that respondent paid significantly higher wages to its New Hampshire drivers, complainant admitted that he did so, but only after the driver showed him an advertisement placed by one of complainant's New Hampshire sites which listed a starting wage of \$13.50 an hour (TR 206).

Another problem arose on June 19 or June 20, when Bernstein walked into the garage and found that a truck could not be put into service because respondent was out of a part needed to service the vehicle – a lube filter (TR 525, 75). Also, he was told by Kenny Palmer, respondent's mechanic, that the vehicle's inspection had expired on June 1 (TR 526). Bernstein immediately wrote a memorandum to the complainant pointing out these shortcomings, which Bernstein blamed on the complainant. As Josh stated, ordering parts was complainant's responsibility (TR 378). Bernstein ended his memorandum as follows: "Please pay more attention to performing your job better. Anymore [*sic*] such failures on your part will result in immediate termination." (CX 15A, 16). Complainant's testimony regarding this incident was an exercise in obfuscation. He testified three times that, contrary to Bernstein's impression, there were four of the lube filters in stock, and that Bernstein's memorandum was "falsified" (TR 79; *see also* TR 73, 76, 269). Then he blamed the problem with the filters on Kenny Palmer, stating that Palmer failed to prepare a parts requisition (TR 79), and blamed the failure to get the truck inspected on Shaw, Bennett, Palmer and the truck's drivers (TR 80; CX 19, at 1). In response to my questions in which I attempted to reconcile what I perceived to be inconsistencies in his testimony, he first testified that he did not run out of filters (TR 269), then very reluctantly admitted that he did (TR 270). Complainant's attempt to hide the fact that respondent ran out of lube filters, and his further attempt to pass the blame for this mistake onto other

people, does not speak well for him.

Complainant also had trouble getting along with some of his colleagues. According to Shaw, complainant was at least partly responsible for the resignation of Laurie Carr, a long-time Palco employee (TR 502). Shortly after complainant came to work for respondent, Carr had to work with him on the drivers' logs (TR 479). Carr complained to Shaw, who was her supervisor, that complainant belittled her, and she could not work with him (TR 479, 502). She quit Palco in December 1999 (TR 502). Shaw further testified that complainant and a mechanic working for respondent during complainant's tenure there, Mike Dickinson, engaged in two verbal altercations. The first, which she described as a "screaming match," took place while respondent was still in Scarborough; the second occurred in Saco (TR 490-91). Shaw testified that Dickinson told her that, in the Saco facility, complainant worked too close to him, since complainant's office was adjacent to the garage where Dickinson worked, and he was going to look elsewhere for a job (TR 492). In fact, Dickinson did resign his position at Palco (TR 491). Shaw stated that she informed Bernstein about Carr and Dickinson's problems with complainant (TR 479-80, 491-92).

Shaw had her own problems with the complainant. As was discussed above, because complainant fell way behind in inputting data into the computer system, Shaw was drafted to help (TR 482-84). After a while, she resented doing complainant's work as well as her own, and she told Bernstein if she had to continue doing it she might quit (TR 485). She also told Bernstein that Tina Larose, who worked for Shaw, might leave with her (TR 485-86).

On the day after the OSHA inspection, Bernstein sent complainant a memo accusing him of being unqualified for his job as safety director. Bernstein contended that the results of the inspection as told to him by Newton at the closing conference indicated that complainant's concerns were either exaggerated or false (CX 21).¹⁵ Bernstein further stated that complainant did not have the best interest of Palco in mind. Complainant did not respond to this memo until July 4 when, while off work due to the holiday, he wrote a letter to Bernstein which can best be described as his attempt at a legal brief supporting his allegations made to OSHA (*see* CX 26). Complainant was off work due to illness on July 5 and 6 (TR 105), and testified that he came to work at 10:00 a.m. on July 7 (TR 111; CX 60). Later that morning he gave the letter not to Bernstein, to whom it was addressed, but to Josh (TR 94-95). There is no evidence that Bernstein either saw or knew of the existence of this letter when he fired complainant.

Between June 22 and July 7 no further incidents between complainant and Bernstein occurred. On July 3, respondent ran advertisements in the *Portland Press Herald* for a diesel mechanic and, under the heading "Office Help," an "administrative individual" familiar with health and safety issues

¹⁵In contrast to Bernstein's impressions, Newton testified that he did not find complainant unqualified for his position (TR 171-72) or that his concerns were overstated (TR 174).

(CX 24). Claimant presumed that, through these advertisements, respondent was seeking to hire a replacement for him (TR 101-05). Prompted by these advertisements, complainant testified that on July 6, he wrote a letter to William Pearson at OSHA (CX 28) representing that respondent was retaliating against him for whistleblowing (TR 105-06). It is clear that Bernstein could not have seen this July 6 letter by the time he fired complainant on July 7. Further, complainant failed to explain why he believed respondent would have needed two full-time employees to replace him. Moreover, complainant admitted that respondent had been trying to hire another mechanic but had been unsuccessful;¹⁶ and the other position was for “Office Help,” not for a safety director, and if anything it appears closely related to Tina Larose’s position rather than complainant’s.

On July 7, complainant’s counsel wrote, and presumably mailed, a complaint against respondent with the Maine Human Rights Commission alleging that complainant was being discriminated against by respondent because of his June 16, 2000 complaint to OSHA (CX 29). That complaint was faxed to respondent probably between 10:22 and 10:28a.m. on July 7, 2000.¹⁷ Bennett testified that respondent received the fax, but he thinks he first saw it sometime around the middle of the day (TR 360). After he looked at it he brought it to Josh. According to Bennett, Josh was upset by it (TR 360-61). Josh does not remember mentioning their receipt of the Maine Human Rights Commission complaint to his father that afternoon (TR 400).

On that day, July 7, complainant arrived at work at 10:00 a.m. (TR 111; CX 60). There is no dispute that when he arrived, Kenny Palmer, respondent’s only mechanic at that time, was working on a repair of the rear end of truck 91 (TR 112-13, 443). There also is no dispute that complainant did not assist Palmer in any way in repairing truck 91 on July 7 (TR 114-15, 446-47). Complainant testified that as soon as he came in he asked Palmer whether he needed complainant to do anything for him in connection with the repair, and Palmer told him he had taken care of everything. So complainant went into his office to catch up on his own work, since he had been out for three days (TR 112). Complainant stated that sometime later he went back to the garage to speak to Palmer, who told complainant he had a call into the GMC dealer because he believed the broken part – referred to by both Palmer and complainant as a “pig” – may be covered by a warranty. Complainant added that Palmer had already called a truck parts company to find out about getting a new pig, and was quoted a price of \$2500 (TR 114). Complainant also stated that Palmer did not ask him for assistance in repairing truck 91 at any time on July 7.

¹⁶In fact, complainant had placed some of these advertisements himself (TR 248-49).

¹⁷Since the affidavit was signed by complainant on July 7, it must have been signed just a short time before complainant went to work that day. Complainant offered no explanation regarding why this document was faxed to the respondent so quickly, but it is obvious that complainant wanted respondent to see this document right away.

According to Palmer, when complainant arrived at work on July 7, Palmer was under truck 91 working on removing the pig from the rear end housing. Complainant asked him if he was having a problem, and Palmer replied that he was. Complainant then went into his office. After Palmer removed the pig, he stated that he copied the make, serial number and gear ratio of the pig from a tag on the rear end housing, and went into complainant's office so that complainant could order a replacement part. He then left to clean up, and went back to complainant's office to see if he had ordered the part, but he had not. Rather, according to Palmer, complainant told him he was writing a letter. *See* TR 445-46.

Palmer went back into the garage, and saw Bernstein going to his car. He testified that he went up to Bernstein and told him he was tired of working with someone "who was lazy and couldn't do their [*sic*] damn job.... I had it right up to here. I was ready to throw in the towel." (TR 446) He returned to work on other things, then later that afternoon he called the GMC dealer to see if the part for truck 91 was covered by warranty. He testified that complainant did not contact any vendors in connection with the repair of truck 91 at any time that day (TR 447).

Bernstein testified that he came to work at 9:00 a.m. on July 7 (TR 543). He remained at the Saco office for two to three hours, at which time he left to play golf (TR 544). While he was in the office he was busy doing routine administrative tasks because Shaw and Tina Larose were not working that day (*id.*). As he was leaving the office to go to the golf course, Palmer was coming towards him and Bernstein said he looked like he was upset. Palmer complained that he could not work with the complainant any more, that he "doesn't help me one bit and I'm really getting fed up with it." (TR 545) Bernstein testified that since their other mechanic, Mike Dickinson, had quit, Palmer had been terribly overworked, and that on July 4th Palmer drove to respondent's Portsmouth, New Hampshire location on his own time to bring a truck that needed servicing back to Saco (TR 546). He believed respondent was indebted to Palmer for his hard work. Further, he understood that Palmer was threatening to quit if Bernstein did not do something about complainant, and since Palmer was their only mechanic, if he quit respondent would be in a very difficult position.

Bernstein testified that, while driving to the golf course, he realized that Dickinson had quit because of complainant, and Laurie Carr had complained about him, and he decided he did not want to lose Palmer also because of him (TR 546-47). At 12:45 p.m., after completing the first hole, Bernstein called Josh on his cell phone and told him that he was sick and tired of getting complaints about the complainant and he was going to fire him (TR 398, 547-50; CX 39). Josh tried to defend complainant, but Bernstein was adamant (TR 398-99). Bernstein was not aware that complainant had filed a complaint with the Maine Human Rights Commission when he decided to fire complainant (*cf.* TR 363, 400). He asked that Josh and Bennett be present at about 6:00 p.m., after his golf game, when he was going to inform complainant of his termination (TR 551-52). When Bernstein returned, the meeting took place, and complainant was fired (CX 33). Both Bernstein and Josh testified that, when informed that he was fired, complainant stated "something to the effect that you guys finally fell

into my trap that my attorney and I had set for you.” (TR 552, 379). Complainant testified that, at this meeting, none of the three respondent’s officials mentioned his writing a letter to the labor board as a reason for his termination; nor did they mention anything about truck 91 (TR 121).

After being informed of his termination, complainant testified that Bernstein, Josh and Bennett would not let him take his personal belongings out of his office, so immediately afterwards he went to the Saco Police Department; but the police would not help him (TR 120). On July 8, 2000, complainant wrote another letter to OSHA stating that he was terminated at 6:15 p.m. on July 7 because he had filed a complaint with OSHA on June 16 (CX 32). Then on July 10, 2000, Bernstein wrote a memo to complainant stating:

You were terminated due to continued poor work performance. On friday [*sic*] you ignored your responsibility as maintenance supervisor by failing to involve yourself in a problem with [the] rear end in truck 91. You did not ask any questions of [*sic*] the truck with Kenny. Your only conversation to him was that you were writing a letter to the labor relations board.

Since you have worked here we have had problems with employee morale, insubordination, lack of productivity, misrepresented qualifications and many other specific deficiencies already brought to your attention.

(CX 33).

Complainant testified that it took about a month to find a new job (TR 122), although at another point he testified that he did not start his new job until the middle or end of August, 2000 (TR 265). He started looking for jobs in safety and compliance, but could not find one and ended up driving a truck for A.M.A. Transportation Co. working nights (TR 122-23; CX 54). Complainant was able to drive a truck at that time because his back had improved since 1995 (TR 264). Claimant testified that he earned \$600 a week at Palco (for a 45-hour work week), and that his base salary at A.M.A. was also \$600 a week (TR 125, 127, 165), so he earned about the same at both jobs. In fact, complainant’s testimony regarding his pay at A.M.A. is both inaccurate and very misleading. It is inaccurate because his base pay at A. M. A. was \$620 a week (for only 40 hours of work), not \$600; and it is very misleading because his actual earnings at A.M.A., which presumably include overtime, were much higher, over \$900 a week (CX 54-55).¹⁸ He also

¹⁸Assuming that complainant started working for A.M.A. about a month after he was fired by respondent, he would have started with A.M.A. on about August 7, 2000. The A.M.A. pay stubs in evidence (CX 54, 55) list complainant’s year-to-date earnings on December 29, 2000 and for 2001 through August 3. Under this scenario, the pay stubs from A.M.A. would cover almost one full year of work. Complainant earned \$47,560.72 with A.M.A. during this period. Dividing this by 52 weeks

testified that he received two weeks paid vacation with Palco, but only one week with A.M.A.. (TR 127). At the end of August or the beginning of September, 2001, complainant apparently was laid off by A.M.A. (*see* TR 265-66) and took another truck driver position, with R.C. Moore, earning between \$400 and \$600 a week working days or nights (TR 127, 265; CX 56). He was still working for R.C. Moore at the time of the hearing.

Complainant testified that when he was fired by respondent he was “devastated”(TR 122). For he testified that he loved the kind of work he was doing for respondent, and financially he was still strapped from being unemployed for more than a year prior to starting with respondent (TR 122-23). He also complained that, because he worked nights for A.M.A., he could not spend any time with his wife or son (TR 125). He added that this put an emotional strain on his wife, causing her to file for divorce (TR 125-26). The problem with this testimony is that Mrs. Nilsen filed for divorce on August 10, 2000, which is either before complainant started working for A.M.A. or at most a few days after, which means that complainant’s working nights for A.M.A. could not yet have significantly impacted their relationship. An alternate version of what led Mrs. Nilsen to file for divorce on August 10 was that complainant’s termination from Palco and his resulting unemployment left him disinterested in everything (TR 125-26, 304-06). But it is hard to believe that someone would seek to dissolve a 20 year marriage so quickly for this reason. In any event, Mrs. Nilsen did not pursue the divorce, electing to try counseling instead (TR 307-08). Finally, It should be noted that in a June 20, 2000 doctor’s report it states that complainant is “presently taking both Paxil and Pepcid” (CX 52). The report goes on to state that the Paxil had been prescribed to treat depression and fatigue, and the Pepcid for reflux esophagitis with gastritis (*id.*). As Mrs. Nilsen admitted, complainant’s depression preceded his employment at Palco, although she stated it got worse in mid to late June, 2000 (TR 312-14).

Discussion

Complainant’s burden under the Act, as under similar statutes protecting whistleblowers, is to prove by a preponderance of the evidence that: (1) he engaged in conduct protected by the Act; (2) respondent took an adverse employment action against him; and (3) the adverse employment action was caused all or in part by the protected activity. *BSP Trans, Inc. v. U.S. Department of Labor*, 160 F.3d 38, 46 (1st Cir. 1998; *Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). Since this case proceeded to a full hearing on the merits, no purpose would be served by determining whether the complainant has established a *prima facie* case. *Boytin v. Pennsylvania Power & Light Co.*, 94-ERA-32 (Sec’y Oct. 20, 1995). The relevant inquiry is whether, looking at the evidence as a whole, complainant has shown that the disciplinary action was taken because he engaged in protected activity. *E.g., id.; Boudrie v. Commonwealth Edison Co.*, 95-ERA-15 (ARB

produces an average of \$914.63 a week. If complainant did not start with A.M.A.. until mid or late August, his weekly earnings with A.M.A. would have been proportionately higher.

Apr. 22, 1997). To meet this burden, complainant must prove that disciplinary action was taken, and that respondent's stated reasons for the disciplinary action taken are pretextual, that they were not the true reasons for the adverse action. *Scott v. Roadway Express*, 98-STA-8 (ARB July 28, 1999); *Leveille v. New York Air National Guard*, 1994-TSC-3, 4 at 4 (Sec'y Dec. 11, 1995).

In regard to weighing the testimony in this case, I find that neither the complainant nor Bernstein were particularly credible witnesses. As is illustrated above, both of their testimonies are full of inconsistencies, self-serving statements and, in the case of complainant, outright lies. In addition, both appear to have rather inflated egos which color their perception of events. Without corroboration from other witnesses or documentary evidence, neither of their testimonies can support a controverted finding of fact. On the other hand, I particularly credit the testimony of Josh, Bennett and to a lesser extent Shaw. Josh and Bennett both like the complainant, and frequently stood up for him. Moreover, they seemed to believe he was a valuable employee despite his shortcomings (*see, e.g.*, TR 398-99). Shaw also appears to have no axe to grind against complainant despite her annoyance with his failure to get caught up with inputting the data into their computer system as well as the friction he created with his co-workers. During her testimony she was very respectful of the complainant, and did not seem at all antagonistic towards him even when she was criticizing him.

Complainant's Contentions

Complainant makes two separate arguments here. Complainant's principal contention is that he was fired by respondent because on June 16, 2000 he complained to OSHA regarding respondent's health and safety practices. In regard to this contention, respondent does not contest that the complainant engaged in protected activity when he filed his complaint with OSHA, that it knew about the protected activity, and that it took an adverse employment action against him when he was fired on July 7, 2000. But respondent argues that complainant cannot meet the last criterion, *i.e.*, that the adverse employment action was caused by the protected activity. I agree.

Since I do not credit complainant's testimony or written statements, and respondent has not admitted either directly or circumstantially that complainant was fired because of his protected activity, the only basis complainant has for a finding that he was fired because of his June 16, 2000 complaint to OSHA is temporal proximity. Complainant argues that the temporal proximity between his termination and his complaint to OSHA – he was fired three weeks after he complained to OSHA – creates an inference of causation; and there is a significant body of case law holding that such a period between the protected activity and the alleged retaliation may create such an inference. But based on the facts in this case, I find that temporal proximity does not create an inference of causation. For one thing, Bernstein is neither reflective nor subtle; if he is going to do something he usually does it immediately, shooting from the hip. This is illustrated by his numerous memoranda to complainant, which in most cases were written shortly after the occurrence of the precipitating

event. It appears to be much more in Bernstein's character to discipline an employee immediately after the event, as he contends he did when he decided to terminate the complainant only a couple of hours after Palmer complained to him, rather than to wait three weeks to do so. In addition, as was indicated above, if Bernstein was looking for an excuse to fire complainant for filing a complaint with OSHA, he could have done so on June 20 or 21 when, due to complainant's error, respondent ran out of lube filters, preventing Palmer from completing a repair on a truck. But he did not fire complainant at that time. Under these circumstances, I find that the three week period between the OSHA complaint and complainant's termination does not create an inference of causation.

But even if complainant was entitled to an inference of causation due to the temporal proximity of the OSHA complaint to his termination, I find that the evidence of record would overcome that inference. First, I credit Palmer's testimony regarding the events of July 7 over that of the complainant, and Palmer's testimony supports Bernstein's testimony that he was afraid Palmer would quit if he did not take any action against complainant. Since Palmer was respondent's only mechanic at that time, Bernstein could not have afforded to take the chance that he might quit. Further, Josh testified that when Bernstein called to tell him he was going to fire complainant, Bernstein was upset because complainant had not helped Palmer on truck 91 (TR 378). Therefore, I find the reason given by Bernstein for firing complainant was not a pretext.

Second, there is absolutely no evidence that Bernstein was upset about the OSHA inspection. As complainant acknowledged at the hearing and in his June 16, 2000 complaint to OSHA, Bernstein actually encouraged him to call OSHA. At some point complainant appears to have realized that this admission was very detrimental to his case; so he changed his story in his July 6 and July 8 letters to OSHA and in his complaint to the Maine Human Rights Commission. Following the inspection, Bernstein believed he had been vindicated, since Newton did not support complainant's contentions regarding fumes and the second door for his office. Moreover, OSHA did not issue the *Citation and Notice of Penalty* (CX 40) until July 18, 2000. Accordingly, as of July 7 Bernstein had no reason to believe that the inspection had any negative consequences whatever,¹⁹ and at that time he would have had no reason to retaliate against complainant due to his June 16, 2000 complaint to OSHA.

Therefore, I conclude that respondent did not terminate complainant because he filed a complaint with OSHA on June 16, 2000. Rather, he was fired on July 7 because Bernstein was afraid Kenny Palmer would quit if he did not fire complainant.

Complainant argues in the alternative that he was subject to retaliation in the form of

¹⁹Not surprisingly, after the OSHA inspection, in which complainant's two major complaints – that his office was subject to excessive fumes and that he was entitled to a second door out of his office – were rejected, things actually quieted down because complainant no longer could complain about these things.

disciplinary memoranda, change in work hours, and a requirement that he sign in and out on a time clock because of the numerous “informal complaints” that he made to respondent. Complainant does not go into detail identifying these “informal complaints,” but apparently he is referring to his oral complaints to Bernstein, Josh and Bennett that he was being exposed to excessive fumes in his office in the new facility in Saco, and that this office’s only entrance was through the garage.²⁰ Complainant argues that “the evidence shows an escalating deterioration in Nilsen’s employment relationship at PALCO started within days after his first informal complaint.” *Claimant’s [sic] Post-Hearing Brief* at 1, 17. That complainant’s relationship with Bernstein may have started to deteriorate around the time he began complaining about being exposed to excessive fumes may be true; but complainant has not established that this change in his relationship with Bernstein was actually due to these complaints. Rather, at about this same time complainant went to the meeting Bernstein had denied him permission to attend, and complainant started falling behind in inputting data required for the computer program he had respondent purchase. These problems clearly could explain any deterioration in the relationship between complainant and Bernstein.

Further, as the preceeding summary of the evidence shows, complainant’s performance at Palco left a lot to be desired. Bernstein’s problems with complainant covered several different issues, and the ensuing critical memoranda appear to have been well-deserved from Bernstein’s prospective, not pretextual. In fact, what is notable about these incidents, other than complainant’s refusal to admit that he might have been at fault in any of them, is Bernstein’s forbearance. Despite being unhappy with complainant’s job performance in several different respects, Bernstein did not fire him or seek to replace him before July 7. Accordingly, even if the various memoranda Bernstein sent to complainant criticizing his job performance could be held to constitute adverse actions – and there is considerable question concerning whether some or all of these memoranda had any tangible job consequences which could be considered adverse (*see, e.g., Davis v. Town of Lake Park, Florida*, 245 F.3d 1232 (11th Cir. 2001; *Shelton v. Oak Ridge National Laboratories*, Case No. 98-100, OALJ Case No. 95-CAA-19 (ARB March 30, 2001) – they were not in retaliation for protected activity. Rather, they were responses by Bernstein to complainant’s job performance and complaints about the alleged problems with his office.

In regard to complainant’s work hours being changed, complainant has not indicated why this change was adverse. Moreover, Bernstein’s explanation of why the change was made – to have someone in maintenance to whom the drivers could report problems after Kenny Palmer’s shift ended (TR 539-40) – makes too much sense to be questioned. Likewise, complainant does not provide a reason why his being required to punch a time clock is an adverse action, and does not refute Bernstein’s statement that Kenny Palmer told him that complainant was not coming in on time (TR

²⁰Complainant’s concerns regarding the safety of the Saco facility were not magnanimous. As can be seen from his July 6 and July 8 letters to OSHA (CX 28, 32), complainant was concerned about only one person’s safety – himself .

597).

In sum, I find that respondent did not retaliate against the complainant because he filed complaints with OSHA or complained to respondent's management about health or safety issues. Accordingly, it is recommended that the complaint be denied.

ORDER

It is recommended that the complaint be denied.

A
JEFFREY TURECK
Administrative Law Judge